D.T.E. 01-31-Phase I

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts

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INTERLOCUTORY ORDER ON VERIZON MASSACHUSETTS' APPEAL OF HEARING OFFICER RULING DENYING MOTION FOR PROTECTIVE TREATMENT

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I. INTRODUCTION

On June 13, 2001, Verizon Massachusetts ("Verizon" or "VZ–MA") filed with the Department of Telecommunications and Energy ("Department") a Motion for Confidential Treatment ("Motion") of a portion of its response to a Department information request, DTE-VZ-2-9.[1] The attachment to Verizon's response identified, on a wire center basis, the number of Verizon's retail business lines, the number of resold business lines, and the percentage of resold lines to Verizon's business lines. In addition, Verizon's response identified the resellers that have installed lines as of January 2001. Verizon requested confidential protection for the information in the attachment that identified the number of Verizon retail business lines and the number of resold business lines on a wire center basis. Verizon provided the entire response to requesting parties in this proceeding subject to a protective agreement. No party filed an objection to Verizon's Motion. In a ruling dated July 19, 2001 ("Ruling"), the hearing officer denied Verizon's Motion, finding that because Verizon's Motion provided only conclusory statements that competitive harm would result from public disclosure, Verizon had failed to prove the need for non-disclosure under the applicable statute (Ruling at 3). On July 25, 2001, Verizon filed an appeal of the Ruling ("Appeal"). Pursuant to a schedule established by the

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[1] In DTE-VZ-2-9, the Department requested the following: "According to Mr. Mudge's testimony, the resale market 'has been active for quite some time' with every exchange served by a minimum of one reseller. Further, Mr. Mudge states that resellers serve 15-30 percent of business lines in exchanges statewide. Please provide complete and detailed documentation in support of these statements about the resale market."

hearing officer, on August 3, 2001, the Massachusetts Attorney General ("Attorney General" or "AG") filed comments in opposition to Verizon's Appeal ("AG Comments"). On August 10, 2001, Verizon filed a response to the Attorney General's comments ("VZ–MA Response"). No other party filed comments regarding Verizon's Appeal.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data, regardless of physical form or characteristics, received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute

"trade secrets, confidential, competitively sensitive or other proprietary information"; second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113 at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also Standard of Review for Electric Contracts, D.P.U. 96-39 at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18 at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not been and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement does not resolve the question of whether the response should be granted

protective treatment. Boston Electric Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998) ("BECo Interlocutory Order").

III. POSITIONS OF THE PARTIES

A. Attorney General

In his comments, the Attorney General argues that the Hearing Officer Ruling should be upheld (AG Comments at 3). The Attorney General asserts that the information Verizon seeks to protect from public disclosure is not private, confidential information as defined by the applicable statute or past Department precedent (id.). The Attorney General argues that Verizon did not meet its burden in its Motion to prove that the number of resold and retail business lines listed on an exchange basis is competitively sensitive, or that disclosure of this information will affect Verizon's ability to compete in the business market (id. at 3-4). The Attorney General argues that this information is non-carrier-specific data which cannot be construed to be competitively sensitive without detailed proof (id.). Verizon failed to demonstrate in its Motion, argues the Attorney General, that disclosure of the number of retail and resold business lines in a particular wire center would hold some special meaning above the overall resold to retail percentage figure per wire center, for which Verizon does not request protection (id. at 4-5).

The Attorney General notes that Verizon included additional arguments in its Appeal which were not part of Verizon's original Motion (id. at 5 and n.4). The Attorney General asserts that the Department should disregard the arguments presented for the first time on

appeal, otherwise parties will be encouraged to submit incomplete motions which engender unnecessary appeals (id. at 5-6). The Attorney General asserts that the hearing officer did not abuse her discretion because she ruled correctly on the limited facts and argument presented in Verizon's Motion (id. at 6).

B. Verizon

In its Appeal, Verizon argues that the hearing officer abused her discretion in denying Verizon's Motion (Appeal at 3). Verizon argues that the Ruling must be overturned because the Ruling is both inconsistent with both the applicable legal standard and the Department's historical treatment of similar requests for protection (id.). Verizon argues that the level of detail provided in Verizon's Motion was consistent with motions for protective treatment filed in other Department proceedings (id. at 7 n.8; Att. 3, 4). If a higher degree of proof is required, argues Verizon, the Department should provide parties with prior notice of the requirement to do so (id. at 7 n.8).

In its Appeal, Verizon argues that the information for which it seeks protective treatment is not shared with non-Verizon employees for their personal use, and that any dissemination to non-employees is labeled proprietary (id. at 5). Verizon further argues that Verizon employees and agents using this information are subject to non-disclosure agreements and that the data are transferred internally over a protected network and marked proprietary (id.). Verizon asserts that Verizon marketing personnel are not given access to the information for the purpose of competing against resellers (id. at 5-6). Disclosure of the wire center specific numbers of resold and retail business lines, argues Verizon, will allow Verizon's

competitors to determine characteristics of Verizon's markets (id. at 6). Verizon contends that competitors can use the information to develop their own competitive offerings and identify which Verizon customers and which exchanges to "target" (id.). Lastly, Verizon argues that other companies are not subject to the same level of scrutiny to which disclosure of such information would expose Verizon (id. at 7).

IV. ANALYSIS AND FINDINGS

The issue before us concerns the Department's treatment of a motion by a producing party to accord non-disclosure status to sensitive information received by the Department in our proceeding. This issue concerns exceptions to the public records law, G.L. c. 66, § 10, available under G.L. c. 25, § 5D, upon rebuttal of a statutory presumption that paper, data, etc. provided in Department proceedings are "public records" under G.L. c. 4, § 7, cl. 26, open to public inspection and copying. The exception available under § 5D is subject to narrow construction. BECo Interlocutory Order, D.T.E. 97-95, at 9-10, citing Attorney General v. Comm'r of the Real Property Department of Boston, 380 Mass. 623, 625 (1980). This issue does not require the Department to find a compelling reason for public disclosure. Our statutory responsibility as a custodian of public records is clear. Unless a document submitted in a Department proceeding falls within the exception provided under § 5D, as proved by the moving party, it is a public record.

Furthermore, we note that increasing levels of competition in traditionally regulated industries has made an accurate demarcation between confidential and non-confidential materials even more imperative, and, therefore, the need for parties to support their assertions adequately

is even greater. As we stated in BECo Interlocutory Order, D.T.E. 97-95, at 10, "[w]ith the advent of competition in many of the industries which the Department regulates, we find ourselves in a difficult position where we must reconcile our dual role as administrative law judge and as custodian of public records." The Department recognizes that disclosure of certain information that is truly competitively sensitive could thwart the creativity and innovation benefits which flow from competition. See State ex rel. Utilities Comm'n v. MCI, 524 S.E.2d 276 (N.C. App. 1999) (reversing state commission decision denying protective treatment to market information provided by competitive telecommunications service providers). Although the Department has no desire to disclose information that is truly competitively sensitive, "we are constrained by the statute requiring public disclosure absent the proper showing of compliance with the statute." AT&T Broadband/Verizon Interconnection Agreement, D.T.E. 99-42/43, 99-52, at 52 n.31 (2000).

We begin our analysis by first looking at Verizon's motion for protective treatment. We agree with the hearing officer that Verizon's original Motion was deficient. Verizon's argument in its Appeal that the Department may not, without prior notice, require a higher degree of proof in reviewing motions for protective treatment is without merit. Claims of competitive harm resulting from public disclosure, without further explanation, have never satisfied the Department's statutory requirement of proof of harm. The Department stated in AT&T Broadband/Verizon Interconnection Agreement:

> We note that many requests for confidential treatment received by the Department fail to address the requirements of § 5D, and parties would be well advised to limit submissions of requests for confidential treatment to documents and data that truly fall within the

> statutory requirements for nondisclosure protection, *and to support those requests fully*.

Id. (emphasis added). As Verizon was an integral party to the above proceeding, as well as numerous other proceedings before the Department, Verizon cannot now say it did not have notice of the Department's requirements regarding the level of proof of the need for nondisclosure. Likewise, because Verizon is a participant in a competitive marketplace and states that it is aware of the competitive risks resulting from improper disclosure, Verizon cannot claim that it did not realize the need to support its assertions to a greater degree than it did in its Motion.

Having noted that Verizon's original Motion was deficient, we also note that Verizon has attempted to correct on appeal the shortcomings of its original petition. Administrative efficiency requires that a party appealing a hearing officer's ruling not be routinely allowed to raise new arguments or factual allegations not presented below but rather injected for the first time on appeal. Administrative efficiency also requires that a moving party state his or her claim fully to the hearing officer and, if dissatisfied with the hearing officer's ruling, appeal that ruling on the petition as presented below. Order on Appeal of Hearing Officer's Ruling, D.P.U. 94-112, at 8 (October 31, 1994); see also Interlocutory Order Delaying Appeal of Hearing Officer's Ruling, D.T.E. 98-78/83, at 6 (October 26, 1998). Based on the shortcomings of the original Motion, the hearing officer was correct in finding, on procedural grounds, that Verizon had failed to prove the need for nondisclosure. However, despite the shortcomings of Verizon's original Motion, we choose to evaluate the merits of the Appeal.

Verizon has explained fully in its Appeal that the information Verizon seeks to bar from public disclosure is not readily available to the industry, and that Verizon takes extensive measures to protect such information when it is made available to non-employees and employees alike, which is done only under limited circumstances (Appeal at 4-6). Further, Verizon states that if the information it seeks to bar from disclosure is made available to the public, it would allow Verizon's competitors to know *which* exchanges warrant greater sales and marketing resources, and which may not (id. at 6; VZ–MA Response at 3). We agree. Therefore, we conclude that public disclosure of the entire unredacted response to DTE-VZ-2-9 could expose Verizon to competitive disadvantage. We next turn to the statutory requirement that we provide protection to only so much of the information as is necessary to meet the established need.

We first note that the information requested by the Department in DTE-VZ-2-9 concerns documentation in support of statements in Verizon's direct testimony regarding the extent of competition in the Massachusetts resale market. As Phase I of this proceeding deals exclusively with the state of competition in Massachusetts, information concerning the resale market is highly relevant to the ultimate decision on the merits in this phase. We further note that it is the connection between the wire center and the number of business lines within each wire center that Verizon argues against disclosing. In other words, Verizon does not assert that disclosure of the number of business lines by wire center that Verizon or resellers have is competitively sensitive, but rather the identification of the wire center in which the business lines exist because disclosure would permit "targeting" of Verizon's existing customers in the

particular exchanges served by the wire centers deemed to be suitable for such targeting. Therefore, to alleviate the possibility of anti-competitive targeting, Verizon is directed to provide to the Department for public disclosure a version of Verizon's attachment to DTE-VZ-2-9 that redacts only the wire center identification. In addition, because the number of resold and retail lines in each wire center is subject to fluctuation over time, and the possibility of competitive harm resulting from disclosure of "stale" information is significantly reduced, we conclude that the information we have agreed to protect here will not require such protection in perpetuity. Therefore, such protection will extend for two years from the date of this Order. At that time, Verizon will have the opportunity to move the Department to further extend such protection accompanied by adequate proof of the need to do so; otherwise, the limited protection we grant today will cease at that time.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Hearing Officer Ruling, dated July 19, 2001, is hereby upheld in part and modified in part, consistent with the above findings; and it is

FURTHER ORDERED: That Verizon Massachusetts' Appeal of the Hearing Officer Ruling, dated July 25, 2001, is hereby denied.

By Order of the Department,

_____/s/_____
James Connelly, Chairman

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Paul B. Vasington, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner